No. 78.
Br. of Taggart & Masten
Office Supreme Court
FILED
SEP 27 1901
for T. & P. Co.

Filed Sept. 27, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. ~~330~~ 78

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN R. CALLENDER, OTTO MAGNUS and HENRY C. HOLDER,
Defendants in Error.

Brief of Texas and Pacific Railway Company.

RUSH TAGGART,
ARTHUR H. MASTEN,
Counsel for Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

INDEX.

PAGE

The Pleadings 1

Facts shown on the trial 3

Assignment of Errors 8

FIRST POINT: *Erroneous construction by Court below, of fourth clause of bill of lading* 9

All special clauses rendered nugatory 10

Scope of third, eleventh and twelfth clausee considered 15

Doctrine of Constable case applicable to third clause 19

SECOND POINT: *Clause as to "awaiting further conveyance" applicable* 22

THIRD POINT: *Defendants were entitled to go to jury on question of delivery* 24

Clayton case distinguished 26

Nature of contract of shipment 28

Analysis of Cases on Delivery 34

Pratt case 34

Converse and Merriam Cases (Connecticut) 36

Result of analysis 42

Smyser case 42

Murphy case 45

Wheeler case 46

Other cases reviewed 52

Foregoing principles applied to this case 60

FOURTH POINT: *Westwego in the Port of New Orleans* 63

Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

JOHN R. CALLENDER ET AL.,
Defendants in Error.

No. 308.
October Term.
1900.

This writ of error brings before the Court for review the action of the Circuit Court upon the trial, directing a verdict in favor of the defendants in error against the plaintiff in error for $6,860.99, and the action of the Circuit Court of Appeals in affirming the judgment of the Circuit Court.

The Pleadings.

The complaint in this action alleges that the plaintiffs, who were partners doing business in the City of Liverpool, England, under the firm name of John R. Callender & Company, did, in the month of October, 1894, at Roxton, Ladonia and Wolf City, in the State of Texas, deliver to the defendant, a corporation organized under an Act of Congress, and engaged in conducting the business of a common carrier of merchandise from various places in the State of Texas

to Westwego, in the State of Louisiana, as a common carrier, 207 bales of cotton, which the defendant received and undertook to carry at a through price or rate of freight from the place of shipment to Liverpool, England, by way of New Orleans; thence to Liverpool by the Elder Dempster Company's line and the Harrison line of steamships, and there to deliver the same. It further alleged that the defendant failed to keep its agreement and carry safely 187 of the bales of cotton received by it, but, by reason of its negligence and carelessness and without any fault of the plaintiffs, the cotton was, on the 12th of November, 1894, wholly destroyed by fire at Westwego, State of Louisiana, at which time and place the same were in the possession of the defendant in the course of such carriage, and as a common carrier as aforesaid, by reason of which the plaintiffs were damaged, etc. (Record, pp. 3, 4).

The defendant admitted the receipt of the cotton at the points named in the State of Texas, but denied that it had agreed to carry the same at a through price as a common carrier from the place of shipment to Liverpool, England, by way of New Orleans, as in the complaint averred. It admitted further that 187 bales of cotton marked as in the complaint described were destroyed by fire at Westwego, in the State of Louisiana, on or about the 12th of November, 1894, but it denied that the destruction of the cotton was caused by the negligence or carelessness of the defendant and without the fault of the plaintiff, and also denied that at the time of the destruction, the cotton was in the possession of the defendant in course of carriage, and as a common carrier as aforesaid (Record, p. 5).

Facts Shown on the Trial.

On the foregoing issues the case came on for trial before the Hon. E. Henry Lacombe and a jury on the 8th day of May, 1899. On the trial the plaintiff produced nine bills of lading (all of the same form), issued by the Gulf, Colorado and Santa Fe Railway Company. One of these bills of lading is found in the Record, pages 85–80, and by stipulation (Record, p. 56) it is provided that but one of the bills of lading need be printed, and the others may be referred to by either party upon the argument of the cause, if desired. The plaintiff also offered evidence as to the value of the cotton referred to in the bills of lading and the location of Westwego—to wit, that it was opposite the City of New Orleans on the west bank of the Mississippi River, and was a regular place of shipment of cotton by steamship lines, and contained elevators for grain, and a wharf for the shipment of cotton, being the terminal of the Texas and Pacific Railway Company at that point (Record, pp. 8–9).

Thereupon the defendant's counsel interposed a motion asking a direction of a verdict in favor of the defendant (Record, p. 11).

This motion was denied, and the defendant introduced evidence on its part (Record, p. 11) which tended to establish the following facts, viz: That early in the spring of 1893 the Texas and Pacific Railway Company constructed at Westwego a large wharf and elevator on the banks of the Mississippi for the purpose of furnishing facilities for transferring to steamships grain and cotton and other commodities received by it, carried by it from points on its line in through shipments, and des-

tined for Liverpool and other points in Europe. This wharf had become, long prior to the fire in question, the regular point of receipt from the Texas and Pacific Railway Company of such through shipments of cotton by the various steamship lines whose vessels carried the cotton and other commodities from New Orleans to points in Europe. A regular method by which this business was transacted had become established.

The first step in an arrangement for the shipment of cotton on through bills of lading was usually an understanding with the steamship company agreeing upon a through rate from points in Texas to Liverpool or other points in Europe for a certain number of bales, and agreeing, also, as to the portion of such through rate which would be the compensation of the steamship company (Record, pp. 13, 29, 69, 70, 101 and 102). Thereupon arrangements would be made with the shipper in Texas for shipping cotton upon bills of lading at such through rate, and the same would be receipted for by the agent of the railway company, signing for both the railway and steamship companies. In the bill of lading issued to the shipper was named the through rate which had been agreed upon (Record, p. 56). The cotton would then be carried by the Texas Pacific Railway Company from the point of shipment to Westwego in the cars of the Texas and Pacific or other railway company, accompanied by a waybill (the form of which is shown at page 65 of the Record), giving the destination, marks of the cotton, weight, rate of compensation to the Texas and Pacific, or other prior railway from which it had been received, the destination, and other information neces-

sary in order to enable the cotton to be carried according to the contract (p. 39).

On its arrival at Westwego this waybill would be delivered by the conductor of the train in which the car containing the cotton was brought to Westwego, to the superintendent of the wharf (Record, p. 39). Thereupon a skeleton of the waybill would be prepared showing all the essentials of the information contained in the waybill and of the form shown in the Record, (page 67). This was taken by a check clerk, who with a gang of laborers unloaded the cotton from the cars. The check clerk, as it came from the car, checked the bales to ascertain that the marks, quantities, destination, etc., corresponded with the information contained on the skeleton waybill (Record, pp. 39, 40). Thereupon the cotton would be located—that is, placed upon the wharf at the point where its ultimate destination entitled it to go; that is, cotton for Liverpool, as a general thing, was placed in a particular shed, or part of the wharf, and cotton destined for other points on other points of the wharf, so that a steamship coming to the shed could receive all cotton for a particular port from the same part of the wharf. These locations were marked by the check clerk on the skeleton as the cotton was checked from the cars (Record, pp. 40, 41).

The skeletons were thereupon forwarded to the office of the Texas and Pacific Railway Company in the City of New Orleans (Record, p. 41). From these skeletons were prepared transfer sheets, which were in the nature of information to the steamship companies of the unloading of the cotton and that it was at Westwego ready to be taken away by the steamship company. These transfer sheets also contained all the essentials of the shipment—marks, destination, con-

signor, consignee, freight charges thereunder, etc., in order to enable the steamship company to fulfill its part of the undertaking, which was to send a ship to Westwego and load the cotton on the ship and carry it to Liverpool or other European port. These transfer sheets were thereupon duly forwarded with a letter to the steamship agent (Record, pp. 13, 68, 69) and were recognized by the steamship agent as a notification of the receipt at Westwego of the cotton, and its being held there by the railway company for the steamship company to come and take it away (Record, p. 26).

The steamship company would when ready send its ship to Westwego with a crew of stevedores for loading the ship; the mate or other representative of the steamship company would go with the superintendent of the railway company on the wharf, and the representative of the railway company would point out the location of all the cotton named by the steamship company for this particular ship, and the employees of the steamship and the stevedores employed by the steamship company would take the cotton and load it on board the ship; when pointed out by the railway company it would be receipted for and the mate's receipt given (Record, p. 41). All the employees engaged in unloading the cotton from the cars and placing the same on the wharves were in the employ of the railway company, but all the employees engaged in loading the cotton on the ship, the stevedores, longshoremen and screwmen, were in the employment of the steamship company and no part of the services of these men was paid by the railway company (Record, pp. 42, 46).

The testimony showed, with respect to the cotton involved in this case, that all of the cotton arrived at Westwego in the month of October, 1894, the earliest being the 17th of that month, and the latest the 29th; that the cotton was unloaded at Westwego from the cars, the earliest on the 17th of October and the last on the 30th of the same month. Notification of the arrival and unloading, in the form of transfer sheets, was sent to the agents of the steamship line for most of the cotton as early as the 2d of November, but for a few of the bales as late as the 10th of November. The abstract showing these facts from the documents produced on the trial by the defendants will be found at page 71 of the record.

No testimony was offered in rebuttal by the plaintiff.

Upon the defendants's closing its case plaintiffs' counsel moved the Court to direct a verdict in favor of the plaintiffs. Defendant's counsel asked permission to go to the jury upon the question of the delivery of this cotton to the steamship company, and upon the whole case (Record, p. 54). The request of the defendant was denied. The Court granted the motion of the plaintiff and directed a verdict for the amount heretofore named, to which exception was duly taken by defendant's counsel (Record, p. 54). The view of the Court in the direction of the verdict is presented in the record (pp. 52–54), and shows the construction put by the Court upon the bills of lading which were offered in evidence by the plaintiff.

Assignment of Errors.

The following errors are assigned by the plaintiff in error:

FIRST. That the circuit court of appeals erred in affirming the judgment of the circuit court rendered against The Texas and Pacific Railway Company, plaintiff in error, and in favor of the defendants in error upon the trial of said cause.

SECOND. That said court erred in holding that the circuit court committed no error in denying the motion of the Texas and Pacific Railway Company to direct a verdict in its favor when the plaintiffs rested their case on the trial.

THIRD. That the said court erred in holding that the said circuit court had properly directed a verdict in favor of the defendants in error upon the trial in said cause.

FOURTH. That the said court erred in holding that the circuit court was right in refusing to direct a verdict for the Texas and Pacific Railway Company at the conclusion of the testimony, as requested by said company, upon the ground that the testimony showed that said company had made a delivery of the cotton sued for to the connecting carrier The Elder-Dempster Line of steamers.

FIFTH. That the said court erred in affirming the action of the circuit court in refusing to direct a verdict for the Texas and Pacific Railway Company at the conclusion of the testimony, upon the ground that, under the stipulations of the bills of lading sued upon, the Texas and Pacific Railway Company's relation to the plaintiffs at the time of the fire in question was that of warehouseman, and not that of common carrier.

SIXTH. That the said court erred in affirming the action of the circuit court in refusing to direct a verdict for the Texas and Pacific Railway Company upon the trial on the conclusion of the testimony, as requested by said company, upon the ground that the defendant, The Texas and Pacific Railway Company, at the time of the fire in question, was an insurer of the safety of the goods of the plaintiffs, whereas the court should have held that the defendant's relation was not that of insurer.

POINTS.

I.

The Court in directing the verdict in favor of plaintiff erroneously extended the scope and meaning of the fourth clause of the bill of lading.

The clause in question is as follows (p. 56):

"4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route Cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for delays in procuring such compression, and shall not be liable for loss or damage of Cotton by any cause while in the compress or on platform appurtenant thereto. Cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of Cotton by fire. No carrier shall be liable for differences in weights or for shrinkage of any grain or seed carried in bulk."

The trial Court in passing upon the motion of the plaintiff to direct a verdict in his favor construed the language "*Cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire,*" as exempting cotton from all the "special provisions" of the bill of lading. In other words, the construction of the bill of lading was, that cotton was shipped, not under the bill of lading at all, but as though the carrier had simply acknowledged its receipt for carriage subject to all its common law obligations in case of loss by fire (Record, pp. 52, 53).

The defendant contested this construction upon the trial, insisting upon its right to go to the jury, and excepting to the construction the Court placed upon the bill of lading (Record, p. 54).

This position of the trial Court was affirmed by the Circuit Court of Appeals (Record, p. 77).

The Court's Construction Renders Nugatory all the Special Clauses of the Bill of Lading.

If it was the intention of the parties to ship this cotton under a full common law liability, as the trial court said, "*unhampered, unqualified by any special provisions of the bill of lading*," the question at once arises, why did the railway company issue this formal instrument to the shipper, and why did the shipper accept the same? All of its special provisions, in case of the loss of cotton by fire, were nugatory under the construction given by the court. The liability to damage to the cotton from any other cause than fire is so remote that it will not be sufficient to justify this entirely useless act.

Evidently the parties meant this bill of lading to have some meaning and effect other than the effect which the common law attaches to the mere receipt of the goods by the carrier.

The question is, what is that meaning? Our contention will be that it is only a limitation of the special clause or clauses in the bill of lading which seek to limit the common carrier's strict liability at common law as an insurer against loss or damage by fire, and that it does not attempt to qualify other clauses in the

contract, which defines when the liability of the carrier should begin or end. Thus, the first clause is the only clause dealing directly with the restricted liability for losses by fire :

" 1. No carrier or party in possession of all or any of the property herein described shall be liable * * * or for loss or damage to property of any kind at any place occurring by fire or from any cause except the negligence of the carrier " (Record, p. 57).

If this stood alone, it is clear that the defendant would not be liable for this cotton except upon proof of negligence.

The liability which the carrier assumes covers not only fire but all the other casualties enumerated in the first clause of the bill. In addition thereto there are possibilities of delays, questions of reasonable diligence in forwarding, the question of particular route. These questions could all arise with any single carrier. These are provided for in further clauses, separately and distinctly numbered.

But this was a through shipment of cotton over connecting lines of carriers-railways and a steamship line. In such a shipment there are additional possibilities of delays at points of connection of the various carriers ; questions of delivery as between these carriers may arise. As in this case, one carrier may have fully discharged its duty, and the next carrier be unable or unwilling to promptly enter upon its part of the work. Many such questions involving liabilities are likely to arise, and it is desirable in the interest both of the shipper and carrier to settle these questions in the bill of lading. This is done in clauses three, eleven and twelve of the Bill, each, as we shall hereafter see, dealing with a different

phase of the subject. The other clauses deal with other topics, but each in a sense disconnected from the other, and each to a greater or lesser extent modifying or qualifying the strict rules of the common law.

Now, the construction given by both the courts below withdraws this cotton from *all* those clauses, and, as we have seen, nullifies all of them as to this shipment. The true rule of construction would be to have all the parts of the contract stand if possible.

Broom's Legal Maxims, p. 540 *et seq.*

This is well illustrated by the decision of the Supreme Court of Ohio in the late case of *German Fire Insurance Company vs. Roost, 45 Northeastern Reporter, 1097.*

This was an action upon a policy of fire insurance upon a house and furniture. The following clause was contained in the general contract of insurance:

"SECTION 2. This insurance does not apply to or "cover * * * any loss caused by explosion, unless "fire ensues, and then the loss or damage by fire only."

Upon a printed and written slip, pasted upon the body of the policy, was the following clause, which was made a part of the policy of insurance:

"It is hereby specially agreed that this policy in- "sures against any loss or damage caused by lightning "to the interest of the assured in the property de- "scribed, not exceeding the sum insured, and subject "in all other respects to the terms and conditions of "the policy hereby referred to."

It appeared that there was located on the opposite side of the street from the premises insured, and some sixty feet distant therefrom, a powder house which was struck by lightning, causing an explosion, the

result of which was to destroy the insured premises. Judgment was recovered by the plaintiff in the Court below. On appeal to the Supreme Court (of Ohio), it was said by SPEAR, J., in his opinion, as follows:

"It is contended, in support of the judgment below, "that, inasmuch as the lightning clause is not a part of "the original policy, but is attached thereto as a modi- "fication, it must therefore control where it is incon- "sistent with other portions of the policy, and that it "is inconsistent with that part of Section 2 which re- "lates to loss by explosion. It is a rule of construction "founded in reason and resting upon abundant author- "ity, that the meaning of the contract is to be gathered "from a consideration of all its parts, and that no "provision is to be wholly disregarded because incon- "sistent with other provisions, unless no other reason- "able construction is possible, and that a special "provision will be held to override a general provision "only where the two cannot stand together. If "reasonable effect can be given to both, then both are "to be retained."

The court then proceeded to discuss the clauses, holding that they were not inconsistent, but that each could be given effect without destroying the other, and the judgment was accordingly reversed.

The construction of the courts below makes the exception of cotton in case of loss or damage by fire extend to all clauses of the bill of lading although the language used in defining the exception indicates a clear intention to limit its scope and effect to a particular clause. Thus the first half of the sentence expressly limits the exception to "*any clause herein on the subject of fire*," while the construction of the Court gives a meaning and scope to the latter half of the sentence which results in withdrawing cotton from all special clauses of the bill of lading.

Here, again, we call attention to the fact that if the latter part of this sentence has the broad meaning at-

tributed to it by the court, the first part of the sentence is unnecessary and superfluous. If it was the intention to amplify the meaning by the latter part of the sentence, and to exempt cotton from all the "special provisions" of the bill, as the courts decided, then it includes all the exemption stated in the first part of the sentence, and also all the clauses upon the subject of delivery as between connecting carriers, etc. A construction which leads to this result seems to us to wrest the latter part of the sentence far from its natural and obvious meaning. The latter part of the sentence must be read in the light of the first, and be construed as relating to the same subject matter. That is stated to be simply the exemption of cotton from any clause herein on the subject of fire. The latter part of the sentence, then, states the effect of such exemption to be to leave the carrier, notwithstanding such general clause in the contract, subject to liability for fire as at common law in the cases and conditions in which that clause would otherwise be operative to relieve the carrier.

If the parties had intended to have the fourth clause mean what the Courts have said, would they not have said, "Cotton is excepted from all special provisions of this Bill of Lading in case of loss by fire," and ended there? Instead of this is the restricted exception, "*Cotton is excepted from any clause herein on the subject of fire.*" It is thus made evident that as interpreted the latter half of this sentence is made to remove cotton from all special clauses of the bill of lading in case of loss by fire, while the first half of the sentence limits the exemption to "*any clause herein on the subject of fire.*" The two parts of the sentence, presumably intended to be in harmony, are made to

mean contradictory things. This is indeed stated in the opinion of SHIPMAN, J., when he says:

"Cotton is excepted from any clause herein on the subject of fire probably refers only to clauses wherein fire is mentioned, but the concluding part of the sentence 'and the carrier shall be liable as at common law for loss or damage by fire,' has a wider sweep and means that the carrier, notwithstanding limitations of its common law liability, which are provided in the bill of lading, retains such liability in regard to damage to cotton by fire" (Record, p. 77).

But this makes the latter half of the sentence to swallow up and render completely superfluous the first half, for if liable in all respects, as a common carrier for loss of cotton by fire, there was no need of excepting it from the provisions of any clauses on the subject of fire. Besides the exclusion in the first half of the sentence from clauses relating to fire only, impliedly indicates that the provisions of other clauses not relating to fire, attach to cotton equally with other classes of goods.

Scope of Third, Eleventh and Twelfth Clauses Considered.

In the third, eleventh and twelfth clauses of the bill of lading are (as we have seen) some provisions governing other very material subjects than losses or damage by fire.

By the third clause it is provided:

"*No carrier shall be liable for loss or* damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier, or to consignee."

In the eleventh clause it is provided:

"No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits further conveyance," etc.

Both of these clauses the Courts hold were nullified by the sentence above quoted in the fourth clause in a case of this character.

The 12th clause provides:

"This contract is executed and accomplished, and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable to the steamship company."

All of these may be enforced and yet the carrier as such be liable as at common law for loss or damage by fire. At common law the question of a carrier's liability in the case of connecting carriers has given rise to much discussion. In England, with its small territory and dense population, the rule early prevailed and has been adhered to that the receipt by a carrier of goods marked for a point beyond its own lines evidenced a contract to carry them the entire distance. This doctrine has been followed by some of the higher Courts in this country. But the weight of authority in this contrary is to the contrary. The Supreme Court of the United States has not followed the English rule. The common law, therefore, as established by the decisions of this Court is that in a series of connected carriers each is only responsible, in the absence of a special contract to carry the entire distance, for the carriage over its own portion of the line (Myrick vs. Mich. Centl. Rd. Co., 107 U. S., 102). Of course, de-

livery at the end of its line to the next carrier ends its responsibility. What constitutes such delivery depends upon circumstances.

In some cases, the mere deposit of the goods in a particular place is sufficient to relieve the first carrier.

Pratt vs. Railway Co., 95 U. S., 43, and cases cited.

In other cases where the first carrier has carried to the end of the line, and is awaiting the second carrier, serious questions have arisen as to the character of the liability of the first carrier.

R. R. Co. vs. Mfg. Co., 16 Wall, 318.
Wheeler on Law of Carriers, p. 282, and cases cited.

It is sufficient to say that the common law furnishes no definite criterion by which to mark when the liability of one carrier ends, and that of the other begins.

Under these circumstances, the shipper and the carriers agree, in the third clause: (1st) "*That no carrier shall be liable for loss or damage not occurring on its own road, or its portion of the through route,*" and (2) "*nor after said property is ready for delivery to the next carrier or to consignee.*"

There can be no question of the carrier's right to stipulate that its liability shall be limited strictly to its own line (Myrick vs. Mich. Central, cited *ante;* Ins. Co. vs. Rd. Co., 104 U. S., 146). So, also, we contend, the carrier in a case of through shipment may stipulate with the shipper that, when it has carried to the end of its route and has the "*property ready for delivery to the next carrier,*" that then it has discharged its duty as a carrier and its responsibility ends. In other words, the shipper

says: "I will take the risks of the next carrier in succession taking the property promptly and will hold you no longer."

Constable vs. Steamship Co., 154 U. S., 51.

This is quite distinct from the question of the liability of the carrier for loss by fire, and the the fact that the shipper exempted the cotton in terms from the clause releasing the carrier from liability for fire by no means indicates an intention to exempt it also from the operation of this clause relating to an entirely different subject matter.

Take the remaining provisions in clause three. Will it be claimed that cotton is exempted from them, and that in the case of a loss of cotton by fire that the value can be proved at any other place than the place of shipment, or that notice would not have been given as provided therein?

The undisputed facts of the case brought this cotton within the exact meaning of this third clause. The cotton had been brought by the Texas and Pacific Railway Company to the terminus of its line at Westwego. This terminus was the recognized point for its delivery to the connecting carrier (Testimony of Miller, M. Warriner, A. Le Blanc, Chas. K. Lincoln, E. L. Sargent, A. L. Wilkinson).

It was placed upon the wharf ready for the steamship company to come and take it away. Notice of its being there was given to the agent of the steamship company some days before the fire, by sending transfers containing all the necessary information to enable that company to identify the particular cotton (see Abstract of Exhibits, p. 71; Testimony of C. G. Miller, pp. 16 and 18). These transfers were under-

stood by the agents of that company to be evidence of a readiness on the part of the railway company to make delivery of the cotton (Testimony of M. Warriner, p. 26). They were returned by the agents of the steamship company when they were ready to take delivery of the cotton *(Ibid.*, p. 26*)*. These transfers had all been returned by Elder, Dempster & Co. to the defendant railway company before the fire *(Ibid.*, p. 27*)*.

Doctrine of Constable Case Applicable to Third Clause.

The defendant railway company was, therefore, entitled to go to the jury upon the question of its readiness to deliver this cotton for several days prior to the fire. Something was said upon the trial by the trial Judge of the invalidity of the stipulations in the third clause, but the decision in the case of Constable vs. National Steamship Company, 154 U. S., 51, holding a more stringent clause in a bill of lading valid, would seem to settle any question upon that branch of the case.

See, also,

Brown vs. L. & N. Rd. Co., 36 Ill. App., 140.

McCann vs. B. & O. Rd. Co., 20 Md., 202.

Ayres vs. Western Rd. Co., 14 Blatch., (U. S.), 9.

In the Constable Case (154 U. S.) the stipulation in the bill of lading was as follows:

"The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee and at his

risk of fire, loss or injury in the warehouse provided for that purpose, or in the public store, as the Collector of the Port of New York shall direct," &c. Also, "to be delivered subject to the following exceptions and conditions—viz., act of God, * * * fire before unloading in the ship or after unloading." * * *

The goods in question were unloaded at a pier, not the pier of the defendant company, upon arrival in the City of New York, and no notice was given to the consignee. After they were unloaded there was not sufficient time for the consignee to have removed the same from the pier at which they were unloaded. They were unloaded late in the forenoon of the 31st of January, the date of the arrival of the steamer, and about 2 o'clock the next morning they were destroyed by fire. It was contended that the stipulations above quoted in the bill of lading were unreasonable, and therefore invalid, but this Court held them valid, and affirmed a judgment in favor of the defendant steamship company.

In the case of Brown vs. L. & N. R. R. Co. (36 Ills. Apps.) the following was the condition of the bill of lading :

"That said Louisville & Nashville R. R. Co. * * * shall not be liable for loss or damage for any article carried from the effects of heat, cold, by wet, dirt, fire or loss of weight, nor for loss or damage on any article or property whatever by fire or other casualty while in transit or while in depots or places of trans-shipment."

The bill of lading was given by a fast freight line, the Kanawha Despatch, the goods being shipped from Evansville, Ind., and Columbus, Georgia, and consigned to the appellants at St. Louis, Mo., and a through bill of lading delivered to the several shippers at the time the

goods were received for transportation. The goods were destroyed by fire in the freight depot of the defendant—the appellee—at East St. Louis, the terminus of its line, while awaiting transfer from its freight depot to St. Louis via the St. Louis Bridge and Tunnel Co., in accordance with written orders which the appellants had previously given to the appellee to ship all freight received for them by that line. The trial Court held that the goods were at the time in a "place of trans-shipment," and, therefore, that the provision of the bill of lading applied, and rendered judgment for the defendant railway company, there being no proof of negligence. Upon appeal the judgment of the trial Court in favor of the railroad company was affirmed.

In McCann vs. Balt. & O. R. R. Co. (20 Md., 202) the goods were received by the railroad company at Baltimore for shipment to St. Louis, under a receipt to which was attached the following memorandum :

"Conditions : * * * the responsibility of the company under this receipt to terminate when the goods are unloaded from the cars."

The plaintiff proved that the boxes containing the goods were broken by rough handling at St. Louis. Upon the trial, after the evidence had been submitted, the appellant and appellee each asked an instruction from the Court. The appellant's prayer was equivalent to a request to direct a verdict in favor of the plaintiff ; the defendant's prayer was, in effect, that a direction for the defendant, based upon the condition attached to the receipt, be given. The Court granted the defendant's prayer, holding the clause in question sufficient to protect the defendant railway company, and from that ruling of the Court appeal was taken. The Court say :

" In examining the contract with the conditions annexed and the evidence in the case, we are of opinion that the responsibility of the appellee ceased upon the unloading of the cars at the terminus of its railroad on the Ohio River. The provision incorporated in the contract that the property in controversy might in certain contingencies be transported by steamboat on the Ohio River to St. Louis forbids the interpretation that ' unloading of cars ' could mean unloading at the place of destination. This view of the case justified the Court below in rejecting the appellant's prayer." Judgment in favor of the defendant was, therefore, affirmed.

II.

If we are right as to the proper construction of the fourth clause of the bill of lading, then under the facts of this case the defendant railway company was entitled to go to the jury upon the question that the cotton was awaiting " further conveyance."

Upon the trial the trial Court, as we have already seen, considered that the provisions of the eleventh clause of the bill of lading had no application to this cotton shipment. In what we have said under the preceding point we have considered what we conceive to be the real meaning and intent of the language in the fourth clause, and it is unnecessary to here repeat it. That the property was awaiting " further conveyance " there would seem to be no doubt. In the Reiss case the Circuit Court of Appeals refused to apply the provisions of paragraph 11 of a similar bill of lading because of the want of notice to the steamship company

of the arrival of the cotton at Westwego. In this case notice had been given some days before the fire. The two cases illustrate precisely the points of difference for the application of clauses three and eleven. When, as in this case, the first carrier has transported the cotton, given notice to the next carrier, and done all it can do, and the cotton is in the terminal agreed upon by the two companies as the point of junction of their lines of transportation, ready to be turned over to the next carrier, and it is the duty of the next carrier to take the property, as it is then located, then clearly the "*property is ready for delivery to the next carrier*," and under this stipulation the shipper agrees to release the first carrier. But where, as in the Reiss case, the cotton was simply unloaded, and the first carrier has something yet to do, before the next carrier in the regular course of business will take the cotton, such as giving notice of the arrival of the cotton, then this eleventh clause comes into operation, providing not for total cessation of liability, but for the limited liability as warehouseman, "while the said property avails further conveyance."

If we are right in this view, then the defendant was entitled to go to jury upon this question, or have the verdict directed in its favor.

III.

The defendant railway company was entitled to go the jury upon the question of delivery to Elder Dempster & Co., and the Harrison Line, the next carriers.

The trial court, in passing upon the motion of the plaintiff to direct a verdict, held as matter of law that there had been no delivery to the steamship companies, and refused to allow the defendant railway company to go to the jury upon this question (Record, pp. 52-53). This, we insist, was error.

The question of whether or not there had been delivery to the next carrier may be determined in the light of the provisions of the bill of lading, or under the construction of the fourth clause given by the courts below the shipment may be considered as subject to the rules of the common law. The trial court indeed considered the twelfth clause of the bill of lading not to alter or modify in any way the common law. Our contention will be that the uncontradicted testimony in the case made out a clear case of delivery to the steamship company, either under the provisions of this twelfth clause of the bill of lading, or according to the principles of the common law,

By the twelfth clause it is provided :

" This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agents or servants, or to the steamship company, or on the steamship pier at the said port."

The testimony in the case shows clearly that, by

arrangement between the steamship companies and the railroad company, Westwego was the point for the latter to deliver, and for the former to receive, all export cotton shipped as this was, on through bills of lading (Testimony, C. G. Miller, p. 21; M. Warriner, p. 41; A. Le Blanc, pp. 45–48; A. Wilkinson, p. 61; Pearsall, p. 71; Lincoln, p. 58).

Such cotton was all handled over the Westwego wharf. No other wharf was provided. It was the wharf which all parties contemplated would be used when the cotton should pass from the railroad company to the steamship line. When the parties to this bill of lading explicitly stipulated that the contract, so far as service until delivery at the port of New Orleans was concerned, should be accomplished by delivery of the property "on the steamship pier at the said port," this pier must have been in their contemplation.

The steamship companies had for the purposes of these shipments made the Westwego wharf their pier. The cotton had been carried by the railroad company to this pier and there delivered as the parties contemplated. Notice of the delivery had been given to the steamship companies, and as to one of them at least acknowledged by the return of the transfers. There was therefore full compliance with all the conditions of this clause of the bill of lading.

These facts at the common law would make the wharf at Westwego the proper place of delivery to the steamship companies, and under the facts in this case would fully have justified the jury in so finding.

Clayton Case Distinguished.

The Court was not justified in the direction of a verdict, and in refusing the request of the defendant to go to the jury upon the question of delivery, by the opinion of this Court in the case of Clayton vs. Texas & Pacific Railway Company, 173 U. S., 348. That case differed radically from this in the character of the stipulations in the bill of lading. In the bill of lading involved in that case, there was the affirmative stipulation, to the effect that

"that carrier alone shall be held liable therefore in whose actual custody the cotton shall be at the time of such damage."

Upon such an affirmative stipulation the Supreme Court held that nothing less than an actual transfer of the physical possession of the cotton to the steamship company, would relieve the railway company of liability. Under such a stipulation actual delivery to the steamship line was necessary, and constructive delivery was not sufficient. The constructive delivery, which is permissible at common law, was excluded by the express terms of the bill of lading in that case.

This is rendered quite clear by a reference to the opinion of Justice HARLAN in the Clayton case. At page 362 he says:

"It is to be observed that neither in the Pratt case, nor in the Converse and Merriam cases, was there any clause in the contract between the parties to the effect that the shipper, in enforcing his claims for liability, should look alone to the carrier who had the actual custody of the goods at the time they lost or destroyed. It is the clause of that character in the bill of lading now in suit which makes the judgments in the Pratt, Converse and Merriam cases inapplicable to the present case."

In the bill of lading in the case at bar these affirmative words to which such effect was given by the Supreme Court in the Clayton case are entirely absent, and there is room for the full application of the rules for constructive delivery laid down and approved by this Court in Pratt vs. Railway Company, 95 U. S., 43.

Not only so, but the bill of lading, contrary to that in the Clayton case, contains clear stipulations indicating recognizing by the shipper constructive delivery as between the connecting carriers employed in this shipment,

Thus, the provision in the third clause already adverted to, that :

"No carrier shall be liable * * * after said property is ready for delivery to the next carrier."

provides for a mode of constructive delivery to the connecting carrier very much short of the requirements announced by the Supreme Court in the Pratt case. So, also, the provision for deposit of the goods upon the steamship pier in the twelfth clause. It will be observed neither provides for notice to the next carrier, but without this the shipper stipulates in each case for the termination of all liability of the first carrier. These provisions of the contract were all set aside by the Court, and the question of fact, as to whether under these provisions delivery had in fact been made to the next carrier, decided by the Court against the facts established by the evidence.

But assuming for the purposes of the further argument that the lower Courts were correct in their interpretation of the bill of lading, still we insist under the facts of this record, that under the principles of the common law, we were entitled to go to the jury

upon the question of delivery. We come, then, to consider the nature of the relations of the railway company to this cotton, and the connecting carriers in the light of the principles of the common law under the facts of this case.

Nature of Contract of Shipment.

What were the respective duties of the Texas and Pacific Railway Company, and the steamship companies under and in view of the arrangements that had been made with the shipper? The Texas and Pacific Railway did not contract to carry this cotton from Roxton, Texas, to Liverpool, England. It was a mere intermediate carrier, entitled to the benefit of the provisions of the bill of lading, and liable only for the carriage upon its own line. This is indisputable under the decisions of this Court.

The question was presented to this Court in Insurance Co. vs. Railroad Co.,104 U. S., 146. A dispatch company had entered into contracts with railway companies forming a continuous line for the shipment of freight, and one of the railway companies was sued under a bill of lading issued by the dispatch company, and it was claimed the companies forming this dispatch line (or whose lines connected formed the dispatch line) had undertaken jointly with the parties shipping over the line; but it was held that such arrangement did not involve joint liability, nor did the division of the sum paid for the entire transportation, between the companies forming the line, involve them as partners; on the contrary, each company under the arrangement simply undertook to transport over its own line and deliver to the

next succeeding carrier; the defendant in the case having delivered the cotton involved in that suit to the next carrier, and the loss having occurred while it was upon this other carrier's line, it was not responsible.

In the case of Myrick vs. The Mich. Central R. R Co. (107 U. S., 102), a similar ruling is made and a similar declaration is recorded. These cases follow and approve Railroad Co. vs. Manufacturing Co. (16 Wallace, 318), and Railroad Company vs. Pratt (95 U. S., 43).

It is to be noted, however, that, by the bill of lading set out in the record in this case, Elder, Dempster & Company's steamship line was a party contracted with by the shipper in the bill of lading. Some of the other bills of lading referred to the same line of steamers and some to the Harrison line. By the thirteenth paragraph of the bill of lading it is provided that the cotton shall be transported from the port of New Orleans to the port of Liverpool by the Elder, Dempster & Company Steamship line (with liberty to ship by any other steamship or steamship line), and the bill of lading delivered to the shipper is signed by an agent for the railway and steamship lines. Under the provisions of T. & P. contract 44 and contract 11 (Record, pp. 69, 70) this contract was fully authorized by the steamship companies. The contracts of the shipper, therefore, were, first, Gulf, Colorado and Santa Fe Railway Company to carry from point of shipment to Junction with Texas and Pacific Railway Company; second, with Texas and Pacific Railway Company to New Orleans; third, with the steamship lines to receive at New Orleans, from the railway company as the agent of the

shipper for that purpose, and carry thence to Liverpool, England, the cotton described in the bills of lading; the steamship companies, on their part, as common carriers, agreeing with the shipper to receive at their usual place of receipt of freight, and under the usual conditions, cotton destined over its route, which it had thus contracted to receive and carry. Was there delivery to Elder, Dempster & Co. and to the Harrison Line?

The Court directed a verdict in favor of the plaintiff upon the theory, as announced, that there had been upon the facts no delivery of this cotton to the connecting carriers, the steamship companies, and that under the terms of the bills of lading it was still held by the defendant, the defendant not having fully discharged its duty in the premises. The defendant claimed that, upon the facts as presented in this case, and under a proper application of the principles of law relating to connecting carriers as established by the decisions of this Court, the defendant had fully discharged its duty, and had relieved itself from liability for this cotton, at the time the fire occurred on the 12th of November, 1894.

There can be no question about the fact that the connecting carriers in this case—the Elder, Dempster & Co. line of steamships and the Harrison line—had made the wharf at Westwego the place of delivery of cotton to them.

Another fact is likewise undisputed, which we deem material for consideration; viz., that Elder, Dempster & Co., and the Harrison line determined for themselves when they would go to Westwego with their ships to take this cotton, which they had arranged to have deposited for

their lines at that point, and carry it from there to European ports. (Testimony of Warriner, 26, Le Blanc, 28, *et seq.*) It is likewise undisputed that the intermediate carrier, the Texas and Pacific Railway Company, had done everything in the way of the carriage of this cotton which it could do; that it had transported the cotton from the point of shipment in Texas to Westwego, and then had unloaded it from the cars in which it had been carried from Texas to the wharf at Westwego, and then all work in the way of the transportation of this cotton, or carriage of the same, was ended; that nothing more could be done by the Texas and Pacific Railway Co. except to point out the location of the cotton upon the wharf when the Steamship Companies came to take it away for carriage over their lines to its destination. In fact, it may be said that it was not within the contemplation of the steamship companies, or of the railroad company, that anything should be done to this cotton after its being unloaded upon the wharf, and that, if both parties had promptly and expeditiously carried out the terms of contracts 44 and 11 no cotton would have had to receive any attention whatever, after being unloaded from the cars, and placed upon the wharf. (Testimony of Wilkinson, p. 43.)

It is also a conceded fact that all the labor of handling this cotton after it was placed upon the wharf, and of taking it aboard the ship, was entirely under the control of the Steamship Companies, who determined when and how that labor would take the cotton from the wharf to the ship, and all the details of that feature of the transportation (Record p. 42.) It is also an undisputed fact, that after the cotton was unloaded upon the wharf, and

transfers were made out and sent to the steamship companies (which were notifications to them that the cotton was upon the wharf in position for removal by them), the steamship companies determined which lots of cotton should be taken on board particular vessels, and assumed to direct the separation or choice of the cotton on the wharf to be loaded (Record, pp. 24, 26, 29). It is likewise an undisputed fact that all the cotton involved in this case had been unloaded, and the steamship companies had been notified of its unloading for a considerable period before the fire of November 12, 1894, the earliest deposit of this lot on the wharf being the 17th of October, and the latest the 30th of that month (Record, p. 71). Transfer notices for the most of the cotton had been delivered to Elder, Dempster & Co.on the 1st and 2d of November and to the agent of the Harrison Line for the remainder the 10th of November, and Elder, Dempster & Co. had returned such transfer sheets to the railroad company prior to the 12th of November, thereby signifying their readiness to take the shipments.

Upon these facts it is earnestly contended by the defendant that there was evidence of a delivery of this cotton to Elder, Dempster & Co. and to the Harrison Line, and that the Court should have allowed the question of delivery to go to the jury.

The question of what amounts to delivery to a carrier by the shippers has been the subject of considerable discussion in the courts, and many cases involving that question have been before the courts for adjudication. A smaller number of cases involving the question of what constitutes delivery as between connecting carriers have been before the courts. That there should be any differ-

ence in the essentials of what constitutes delivery between two carriers in line, the one succeeding the other in the shipment of goods, the one's liability beginning where the other's liability terminates, and delivery in the first instance from the shipper, we are unable to conceive. In the case of the shipper, the liability of the carrier, it is settled, begins the moment the goods come into the possession of the carrier; the moment the carrier's duty with respect to carrying those goods begins, that moment the shipper ceases to be responsible for their safety, and the responsibility of the carrier begins. The same line of division, we imagine, must be the ultimate test as between connecting carriers. The first carrier or an intermediate corner occupies the position of agent of the shipper in making delivery to the next carrier after it has carried to the end of its route. When the first has discharged his duty, done all in the line of transportation that he can do, and has placed the goods in the control of the second, or by the deposit of the goods where the second carrier has by agreement or custom appointed for their delivery to him, or in whatever way, has cast upon the latter the duty of thenceforward carrying those goods, determining when they shall start upon their carriage and course, that moment the responsibility of the second carrier begins, and the responsibility of the first terminates. This seems to us clearly to be the result of the decisions of this Court at least, and the principles which, applied to this case, we believe, require a determination different from that arrived at by the courts below.

Analysis of Cases Upon Delivery by Connecting Carriers.

Pratt case.

Let us analyze the leading case of Pratt vs. The Railway Co. (95 U. S., 43), and, as nearly as we can, get at the reason of the decision in the light of the authorities which are quoted in the opinion.

In this case the Grand Trunk Railway Co. was defendant, and the action was to recover damages for its failure of duty as common carrier in respect to certain merchandise shipped from Liverpool to St. Louis, and carried by the defendant from Montreal to Detroit. At Detroit the defendant had no freight room, except a single apartment in the freight depot of the Michigan Central Railroad Company. This depot was a building several hundred feet long and three or four hundred feet in width, all under one roof but divided into sections or apartments. The railroad track upon which cars were to run to be loaded with freight was in the centre of the building. The only use which the defendand had of this section allotted to it was for the deposit of goods and property which came over its road, or were delivered for shipment over it. This section, in common with the rest of the building, was generally under the control of the Michigan Central Railroad Company. The defendant employed two men in this section who checked freight for it. Goods which came into the section from defendant's road, destined over the road of the Michigan Central, were, at the time of unloading from defendant's cars, deposited by the employees who unload them in a certain place in this section, from which they were loaded into the cars of

the Michigan Central Company by its employees when they were ready to receive them. After they were so deposited the defendant's employees did not further handle the goods. Whenever the agent of the Michigan Central would see any goods deposited in the section of the freight building set apart for the use of the defendant that were destined over the line of the Michigan Central, he would call upon the agent of the defendant, and from a way-bill he would make a list of the goods, and then for the first time learn their place of destination, together with the amount of freight charges due therefor. From this information a way-bill would be made up by the Michigan Central for the transportation of goods over its line of road, and not before

The particular goods involved in this suit were, on the 17th of October, taken from the cars of the defendant and deposited in that part of the apartment or building used by the defendant, as the place for goods destined over the Michigan Central. When these goods were forwarded from Montreal, as was customary, a way-bill was made out in duplicate, on which was entered a list of the goods, names of consignees, place to which the goods were consigned and amount of charges. One of these way-bills was given to the conductor of the train carrying the goods, and the other forwarded to the agent of the defendant in Detroit. The way-bill accompanying these goods was given to the conductor, and on the arrival of the goods the conductor delivered his copy to the checking clerk of the defendant, who checked the goods from the cars. It was the practice of the Michigan Central Railroad Company before forwarding such goods to take from this way-bill the place of destination of the goods and

a list of the same and to collect the amount of accumulated charges. *The Michigan Central agent had not called on the agent of the defendant to learn the place of destination of the goods, and no way-bill had been made out by the Michigan Central for the transportation of the goods over its line of railway.* Upon these facts it was the opinion of the Supreme Court that these acts constituted a complete delivery of the goods to the Michigan Central, by which the liability of the Grand Trunk Company, the defendant, was terminated, for four reasons :

" 1. They were placed within the control of the agents of the Michigan Company.

" 2. They were deposited by one party and received by the other for transportation, the deposit being accessory, merely, to such transportation.

" 3. No further orders or directions from the Grand Trunk Company were expected by the receiving party, and, except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company and forwarded without further action of the Grand Trunk Company.

" 4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon, and the marks upon them, ' P. & F., St. Louis,' were sufficient notice that they were there for transportation over the Michigan road towards the City of St. Louis; and such was the understanding of both parties."

The Connecticut Cases, Merriam and Converse.

The Court specially cited in favor of this conclusion two Connecticut cases, also cited in a previous part of the opinion, which we think throw very considerable light upon the question we are considering. Merriam vs. Railroad Co., 20 Conn., 354, and Converse vs. Transportation Co., 33 Conn., 166).

As indicating the understanding of the text writers as to what these authorities really decide, we quote Hutchinson on Carriers, 2d Ed., Sec. 90, as follows:

"But while it is the undoubted general rule that the delivery, to bind the carrier, must be made either to him or to some one with authority from him, or who may be presumed to have such authority, it is not to be understood that it is not subject to such conventional arrangements between the parties as they may choose to make in regard to the mode of delivery, or that it may not be varied by usage or by a particular course of dealing between them. They may make such stipulations upon the subject as they may see fit, and when such stipulations are made they, and not the general law, are to govern. If, therefore, the parties agree that the goods may be deposited for transportation at any particular place, and without any express notice to the carrier, such deposit will be a sufficient delivery; and proof of a constant and habitual practice and usage of the carrier to receive the goods when they are deposited for him in a particular place without special notice of such deposit, is sufficient to show a public offer by the carrier to receive the goods in that mode and to constitute an agreement between the parties by which the goods, when so deposited, shall be considered as delivered to him without any further notice. Such a practice and usage are tantamount to an open declaration, a public advertisement by the carrier that such delivery should of itself be deemed an acceptance by him, and to permit him to set up against those who had been thereby induced to omit it, the want of the formality of an express notice which had been thus waived would be sanctioning injustice and fraud. As where, for instance, the delivery was upon a private wharf or dock used exclusively by the carrier, and upon which it had been its custom and constant usage to receive goods left there for transportation by it, such deposit in the usual and accustomed manner would be constructive notice, and would be regarded as a sufficient delivery, though the goods *were not left in charge of any of its servants.*"

Referring to the cases themselves, in the Merriam case the facts were these: Plaintiff was owner of a box of goods to be shipped over defendant's steam-

boat and railroad line from New York to Meriden, Conn. The box was placed upon a dock in New York belonging to defendant at the usual place where freight destined for that boat was left. The box was lost, and the railway company defended upon the ground that the box was not delivered to it; that its servants had no notice of the delivery of this box, and that it had never come into its possession. The Court say that no common carrier can be charged for the loss of property unless there has been delivery to the carrier; but that it being the constant, habitual practice and usage of the defendant to receive property at a dock for transportation in the manner in which it was deposited by the plaintiff, and without any special notice, such deposit by the plaintiff, even without notice to the defendant, was a delivery to the defendant of the property thus placed.

They liken such deposit of property to the deposit of a letter in the post-office or foreign mail, and to a deposit of articles for carriage in a public box provided for that purpose by an express company.

In the succeeding case of Converse vs. Norwich and Northern Transportation Co. (33 Conn., 166), which is the case cited as special authority for the conclusions in Pratt vs. Railway Co., the facts were that the transportation company, defendant, was a common carrier between New York and New London. The wool, for the loss of which this suit was brought, was taken on board one of their vessels and carried to New London, put into the depot building on the wharf during the night of Saturday, May 7, and was destroyed by fire on the afternoon of Sunday, May 8. The wool was bound for Stafford, Connecticut. The defendant and the New London and Northern Railroad Co. had an agreement

by which they connected at New London. The railroad company had agreed to "build and furnish a good and "substantial wharf at New London on Water Street, "of certain dimensions and for the use of such wharf, "depot building, &c., the transportation company and "the Norwich and Western Railroad Company are to "pay jointly to the New London and Northern Rail-"road Co. an annual rent of $4,000." The goods were deposited by the defendants in the usual place of deposit for freight destined for points on the line of the railroad. *The common course of business in regard to such freight was for the defendants to make out a way-bill of the several articles brought to the dock and hand it to the agents of the road at New London shortly after the arrival of the boat.* The railroad company employees loaded the freight on their cars, taking it from the place where the defendant deposited it and checking each article on the way-bill as it was taken up. If any article described in the way-bill was not found, or was in bad order, the defendant looked it up, or put it in proper condition. In the case of through freight, the clerk of the boat transporting it was accustomed to make out a bill for the whole freight upon each parcel, and hand it with the way-bill to the agent of the railroad company at New London.

It does not clearly appear in the statement of facts whether these particular articles of freight were, in accordance with the custom, checked upon the way-bill by the agent of the railroad company, or that the way-bill had been delivered to the agent of the railroad company as was customary; but a request to charge on the part of the defendant set out in the record would seem clearly to indicate that these things had

not been done as to this particular shipment of goods, for we find (p. 172), the following request to charge :

" The defendants also claimed and requested the " Court to charge the jury that, if the goods of the " plaintiffs were not delivered to the New London and " Northern Railroad Company until they were checked " by that company upon the way-bill and put into their " cars, they were held by the defendant after they " were deposited in the depot in the customary " manner not as common carriers, but as warehouse- " men, and, therefore, the defendants were not liable " in this action."

Upon these facts the Court say upon the question of delivery to the railroad company (p. 181) :

" It must be conceded that the defendants have transported the wool to their terminus, and carried and placed it in the common depot by the side of the railroad track, at a spot where they by usage were expected by the northern road to place it, *and that no other or further act of carriage or actual manual possession was or could be expected of them. And so it must be conceded that actual manual possession had not been taken by the northern road, nor is there any direct evidence of an express agreement that the carriage to, and placing at the side of the track, in the depot, should be deemed a delivery to the road.* And, at first sight, it would seem just and equitable to hold that the carriage in fact was finished by the transportation company, and that the goods were in deposit by mutual arrangement in a joint depot, to await an actual manual reception by the northern road at a future convenient hour ; and so, looking to the equities of the case and the large amount involved in the other cases dependent upon the decision of this, we should be very willing to hold, if we could do so consistently with principle. But there are insuperable difficulties in such a view of the case.

" We have no difficulty in determining, indeed we must hold, that there was a mutual agreement or tacit understanding equivalent to such an agreement that *the transportation company should place the through freight at that precise spot, and that the northern road*

should take it from thence at a time convenient to them. The construction of the depot and the uniform usage are conclusive of it. The depot was constructed with a platform by the side of the track for the reception of goods to be taken from or put into the cars; and on that platform the railroad company, in the first and every instance of delivery by them, placed their freight, *and the transportation company at their convenience took it away and carried it on board their boat. And so the transportation company in like manner, in the first and every instance, placed there the freight for the northern road, and they at their convenience put it in their cars and took it away.* And the usage was precisely the same with the Worcester road. It would be a forced construction of this usage, or rather the agreement inferable from it, to say that an intermediate joint deposit was contemplated. Moreover, the depot was not the joint depot of the two parties only, or erected for that purpose only, but the joint depot of three, including the Worcester road, and erected for and used by each, not only for the mutual delivery and reception of through freight, but independently in transacting their independent local business. Again, the defendants were carriers by water, and their place of landing and delivery must necessarily or would naturally be a wharf. This depot was a wharf, covered and enclosed indeed, but still a wharf, and the only one occupied by them. Upon this wharf and into the enclosure the northern road laid their track for the delivery and reception of freight to and from the transportation company. Both parties then contemplated a delivery and reception on this wharf and in this enclosure, and obviously in the precise manner actually pursued. *If a carrier by water notifies the consignee of his arrival and readiness to deliver the goods, and the consignee says to him 'land them in a particular place on a particular wharf, and I will take them away at my convenience,' and he so lands them, it is a delivery.* And what he says in particular cases expressly he may say for all cases and by his conduct or by usage. And so these connecting carriers practically if not expressly said to each other. It is clear then that both the transportation company and the northern road contemplated that a placing of freight by either intended for the other upon that platform was all that either was to do by way of delivery of their freight to each other; that they did not contemplate such placing as an

immediate deposit, to be watched by the party depositing, or as a joint deposit, at the joint risk and in the joint possession of both; but that they relied on the enclosure as a protection, and considered the placing of the freight in the usual spot upon the platform as a delivery.

"The minor facts respecting the time and manner of delivering the way-bills—the examination of the freight and checking of the way-bills to be sure that all had been delivered—the proportionate extent and manner of their joint use and possession of the depot—the looking up or paying for missing goods—and the practice of letting the Saturday freight remain on the platform until Monday morning—are only material as they bear upon the great question, namely, what was it agreed or understood between the defendants and the northern road should constitute a delivery from one to the other?"

Result of Analysis.

If we stop now at these cases and carefully consider them, it seems evident that the common principle which is found in the three cases is that which is first enunciated in Merriam vs. Hartford and New Haven R. R. Co., that the carrier becomes liable upon the delivery of the goods to it, and that, as stated in the Converse case, if the carrier either expressly, or, as the result of custom, says to the shipper, "*Land your goods for me in "a particular place, on a particular wharf, and I will "take them away at my convenience," that then the landing of the goods at that place is a delivery to the carrier, who has thus stated his readiness to receive them.*

The Smyser Case (Illinois).

That this is the principle underlying the decision of Pratt vs. Railway Co. is shown by the case of The Illinois Central Railroad Company vs. Smyser & Co. (38

Ill., 354), which is also cited with approval in the body of the decision. In this case the facts developed this mode of doing business: Williamson, Haynes & Co., commission merchants at Cairo, Ill., received cotton from the steamboat a few days prior to the 23d of October and piled it on the open levee in the rear of their wharfboat. The mode of doing business then at Cairo was: When warehousemen have cotton to ship by rail they apply to the company for the requisite number of cars, and they are sent on the side-track of the company to the warehouse, and the shipper there loads the cotton upon the cars and makes out a manifest and leaves it with the agent of the company, *who has the bales counted, and, if found to be correct, a bill of lading is signed* and a locomotive sent to remove the loaded cars and to place them in the train destined to the point to which shipment is made.

On the morning of the 23d, Williamson, of the firm of Williamson, Haynes & Co., gave notice at the office of the company that he had a carload of cotton to ship, and requested a car for that purpose. A car was taken down on the side-track to a point opposite his boat, about 10 A. M., and left in charge of Williamson, Haynes & Company, and during the day they loaded the cotton into the car. The agents of the defendant were notified at their office in Cairo that the cotton was loaded on the car, and manifests of the number of bales and amount of charges were presented to the agents on the evening of the same day at their office. *The cotton was left standing on the side-track where it was loaded, but the bales had not been counted and no bill of lading or receipt had been given for it.* On the morning of the 24th of October the cotton was consumed by fire, com-

municated to it, as supposed, by a spark from a passing locomotive. The action was brought by the plaintiffs, who were the owners of the cotton, to recover for the loss thus occasioned.

It was contended on behalf of the defendant that the cotton at the time of its destruction was in the possession of Williamson, Haynes & Co., and was not in the possession of the railroad company, and that it had not yet received it either as a carrier or for safe-keeping. This contention was founded upon the fact that the agent of the company had not counted the bales, or made out a bill of lading, or accepted the cotton by the issue of a receipt or bill of lading, and that only after this was done, the universal custom was for the company to send a locomotive and remove the car from the possession of the shipper to the company's main tracks. The Court says, Chief-Justice WALKER delivering the opinion (p. 381):

"It is not the mere signing a bill of lading which transfers the possession of freight to the company, but it is the evidence that they have received possession. Their possession may be shown by any other legitimate evidence. The liability of the common carrier is fixed by accepting the property to be transported. If, however, goods are placed on his cart, boat or car without his knowledge or acceptance or that of his agent, he is not liable (Angell on the Law of Carriers, Sec. 140). If the owner or person having the custody of the goods to be shipped never parts with their possession, or does not place them under the control of the carrier, there is no bailment, and consequently no liability incurred *(Ibid.)*. But in this case the company by their acts accepted the trust. The cotton was not placed in the car without their knowledge, but it was with their express assent. Had the empoyees of Williamson, Haynes & Company placed the cotton on the platform of the depot, with the assent of the company to be transported, no one would doubt their liability, and yet in principle no difference is perceived."

Murphy Case (Arkansas).

Railway Co. vs. Murphy, 60 Ark., 333, is a case upon its facts very similar to the case last cited. In that case, as in the Illinois case, the company placed upon a side-track at a flag-station an empty car to be loaded with cotton, and its custom after loading the car was to remove the car upon notice given by the shipper of its destination, and that it was ready for removal, and subsequently to issue a receipt and bill of lading. In that case the car had been loaded and notice of the fact of loading had been given to the agent of the next station below, where such notice was customarily given. The cotton was set on fire while awaiting removal by a train.

The Court in the opinion gave controlling force to the fact that the cotton was deposited at the place appointed by the carrier, and that the shipper had done all that was in his power and all that the company required before shipment; that the moving of the car with the cotton from the place, designated by the carrier for its reception, awaited solely the convenience of the carrier. As in the Illinois case, the furnishing of the name of the consignee and the place of destination, the counting of cotton by the carrier and the issue of its receipt or bill of lading therefor—all were deemed immaterial circumstances as bearing on the question of delivery; it was held that the delivery was complete when the cotton was deposited by the shipper in the place customarily designated by the carrier as the place where cotton destined for carriage over its line would be received, and when so deposited it was in the discretion of the carrier as to when, and how it would take the cotton away from that place.

In the case at bar, the Court, in directing a verdict, sought to distinguish this case from the Pratt case because the wharf belonged to the railway company and the steamship company only had access to it for the purposes of shipment. But we submit that the question of the title of the wharf cannot affect the question we are discussing. If the wharf were a joint wharf, then we would have the facts of the Converse case and no serious question could be made of the application of the principle decided in the case. Does the fact that the railway company owns the wharf, and makes an arrangement with the steamship company by which it is the point of receipt by the steamship company of goods deposited upon the wharf by the railway company, change the liability of the steamship company when the goods are there deposited for the steamship company? The question of the ownership of the wharf is an immaterial consideration. The material consideration is: Is it the place designated by the steamship company to deposit goods destined for its lines?

The Wheeler Case (New York).

In a case in its facts substantially identical with the case at bar the principle we contend for here was applied by the Court of Appeals of New York (Insurance Co. vs. Wheeler, 49 N. Y., 616). In that case the action was brought to recover the amount of insurance paid by the plaintiff upon a quantity of flour shipped at Milwaukee for Boston, and alleged to have been destroyed by fire at Ogdensburgh, while in possession of defendants, as common carriers. The flour was shipped upon one of the boats of the Northern Transportation

Company, which company ran a line of propellers from Milwaukee to Ogdensburgh, where it connected with the Northern Central Railroad for Boston. This road was run and operated by the defendants; the railroad and propeller line ran in connection with the defendant's railway under a *pro rata* agreement as to freight. The contract of shipment was dated at Milwaukee, July 12, 1864, and was as follows:

"Shipped in good order and well-conditioned by A. "J. Hale, as agent and forwarder, for account and risk "of whom it may concern, on board the propeller "'City of New York' (C. J. Chadwick, Master), now "lying in the port of Milwaukee, and bound for Og- "densburgh, the following articles, marked and num- "bered as per margin, and which are to be delivered in "like good order and condition (the leakage of oils, "molasses, liquors and other liquids, and the dangers "and accidents of navigation, fire and collision ex- "cepted), without delay unto consignees at Ogdens- "burgh, paying freight and charges." In the margin was "H. & W. Chickering, Boston, Care George A. "Eddy, agent, Ogdensburgh."

The transportation company had an agreement with the defendants, who were in possession of and operating the railroad running east from Ogdensburgh, to transport over their lines through freight in connection, and divide the compensation as provided by the agreement. The transportation company contracted for the carriage of the flour to Ogdensburgh only, but the freight for the entire carriage was $1.10 per barrel. This was divided between the transportation company and the defendant.

An examination of the original record of this case in Cases in Court of Appeals, Abb. Ann., 1872-73, Vol. 187, of the Law Institute Library, shows almost an exact counterpart of the case at bar, upon the facts. A very concise statement of the facts of the case is con-

tained in the report of the Referee, A. B. James. It is as follows:

There was an arrangement between the said Northern Transportation Company and defendants that all freight brought by cars going west, and all freight brought by propellers going east was to be handled and transferred by the former at the price of 30 cents per ton, each paying half, and that such handling consisted in taking the freight from the car and putting it on the wharf ready for the boat when prepared to receive it, and from the boat and putting it into the warehouse ready for the cars when sent to receive it; that the warehouse used was the property of said defendants as trustees, but rented to the Northern Transportation Company; that the mode of business on the receipt of property by the N. T. Co., after having it transferred from the boat to the warehouse, was to notify the defendants of the fact, giving the specifications of the property, its destination, quantity, rate and amount of back charges, *and, when the cars were sent for it, to tally it out and deliver it to the employees of the defendant, by whom it was received and placed upon the cars for transportation;* that defendants were duly notified of the arrival of this flour and its destination, but in consequence of the deficiency of cars to do the business thus presented, occasioned by some of their cars having been impressed for Government use, they were, without fault or negligence, unable to and did not send any cars to receive said flour, and said flour never came to the possession of defendants as carriers or otherwise.

The testimony of the various witnesses brings the case still closer to the facts of the case at bar. Thus Dennis P. Gardner testified that he was the tally clerk

to tally freight off of propellers and to the railroad; he had charge of the crew who piled the freight into the sheds or warehouses and locked the warehouse at night, keeping the key in the office of the N. T. Co. The flour was in warehouse marked "No. 1;" he was in the employment of the N. T. Co., and had headquarters in its office; when he did not have the keys, left them in the office of the Northern Transportation Co.; when the freight was landed no one in the employ of the railroad was there to take account of it; the railroad company first took note of property when loaded on to cars; no one that I know from the railroad had any knowledge of any property until it was loaded and when freight was loaded into the cars the tally clerk of the railroad first took account of the property.

The testimony of Philo Chamberlain was as to the arrangement respecting the use of the wharf; and D. W. C. Brown, assistant superintendent of the Northern Road, testified that the final conversation between Chamberlain, Eddy and himself was that, "We (the "Railroad Company) would pay them 15 cents per ton "to handle and deliver to our cars," which he testified later was accepted; then the warehouse, he testified, was rented by the N. T. Co.; and on cross-examination he testified to having an account with the N. T. Co. for rent and for the 15 cents per ton for handling the freight.

Julius Beahse, tally clerk for the railroad company, testified that he received freight from the N. T. Co. and saw it properly loaded, too, the whole of it; he took account of the freight from the order sent in from the N. T. Co., copied from the order into the tally-book, then went to the warehouse and got the goods;

that Gardner had men to handle the flour: "Gardner "kept tally of the flour as well as I did; the men got "their pay in the N. T. Co.'s office. Gardner or some "of the clerks of the N. T. Co. had the key of the "warehouse."

Gardner, recalled, also testified that "No one tallied "the freight unloaded from the propellers until we "loaded it into the cars;" that he did not always tally; that he sometimes took Beahse's tally.

The Referee found (as did the trial court in the case at bar) that the flour had never come into the possession of the defendant, and that it never entered upon any duty or duties as carrier in relation to it, and was therefore not liable for its loss.

This conclusion was reversed by the General Term, and the position of the General Term was affirmed in the Court of Appeals.

The question presented in the case was precisely the same as though in the case at bar Elder, Dempster & Co. or the Harrison Line had been sued instead of the railway, and they had defended upon the ground of want of delivery of the cotton to them. The Court of Appeals, in consider- ing the case upon the facts, say through GROVER, J.:

"The further fact that the bargain for this service was made with Chamberlin by the Transportation Company was immaterial. The service performed by him was in the common business of both, and he was paid by each equally therefor, and must be considered in the employ of both. *The title to the warehouses was not material. They were used by both parties for the transaction of this business, and, the defendants owning both, to equalize the matter, rent for one was paid by the Transportation Company to the defendants, but both were used by the parties for the transaction of the business. It is the use of the warehouse that is to be looked at, and not the title in determining the question.* I have

looked outside of the findings for some of the facts, for the reason that the case is referred to in the findings for this purpose. What is said about the key being kept when out of the possession of an employee of Chamberlin in the office of the Transportation Company, by the witness, is not material, as there is no pretense but that property placed where this was, was taken and transported by the defendants at their pleasure. The case shows that notice of the arrival of this property and its destination was given by the Transportation Company to the defendants, by whom it was entered on their books for transportation. The flour remained in the warehouse for eight days after this, for the reason that the defendants had not cars for its transportation, when with the warehouse it was destroyed by an accidental fire. In *Coyle vs. The Western Railroad Corporation* (47 Barb., 152) it was held that placing barrels in the usual place of delivery to a forwarder for transportation, which were received by persons in its employ, a part with the knowledge of the agent, though not counted, tallied or receipted for, as had been usual between the parties, placed them in its possession as a common carrier. In *Converse vs. The Norwich Transportation Company* (33 Conn., 166) it was held that when a company engaged in the transportation of goods by water, in connection with a railroad company, for through rates, divided between them, and the usage was for the boats upon arrival to deposit such goods upon a covered wharf used in common, and for the railroad to take such goods from there for transportation, that a deposit by the boat, according to the usage was a delivery; and that the water line was thereby discharged from further responsibility (see, also, *Mills vs. The Michigan Central Railroad*, 45 N. Y., 622). In the present case the flour was not only deposited in the usual place, but notice was given to the defendants, who entered it upon their books. *From this time it must be held to have been in the possession of the defendants as common carriers.*"

Other Cases Illustrating the Principle of Pratt vs. Railway Co.

The principle of law which we contend underlies Pratt vs. The Railway Co., and which was thus misconceived by the Court upon the trial of this case, is very clearly set forth in other authorities by the State and Federal judiciary.

Thus where a railroad company erects a platform for the purpose of shipping cotton and its course of business is such as to induce parties to store cotton on it for shipment by next freight train, and a party does so store it there for shipment, and the train passes and neglects to put it on, and it is destroyed during the delay by fire caught from the sparks from the company's engines, the company is liable for the loss, upon the theory that it has been received by it, and is in its custody and control (Meyer vs. Vicksburgh Railroad Company, 41 Louisiana Ann., 639).

The case of Montgomery & Eufaula Ry. Co. vs. Kolb, 73 Ala., 396, is a clear case showing that a carrier may be responsible for freight delivered although in direct disobedience of its regulations for the receipt of freight. In this case the superintendent of the defendant had issued instructions for the conduct of its business, requiring all cotton to be delivered accompanied with instructions as to marks and shipper and no receipt to be issued for cotton until the cotton was upon the platform of the company, and accompanied with proper shipping directions. This cotton was delivered in the yard without shipping directions and upon evidence that such

a course of business was followed at this particular station and much of the cotton received there was received in the same way, the company was held responsible for this cotton, although no notice of the deposit of the cotton had been given to the defendant. The opinion quotes with approval Hutchinson on Carriers, Secs. 90 and 91 (quoted *ante*, 37) as to what constitutes delivery to a carrier.

Note that in this case express directions had been given to the agent as to the manner in which cotton should be received. These directions had been disregarded in this instance, and the sole basis upon which the company's liability was determined was that it had been the custom of the agent at the station to allow goods to be deposited alongside of the platform from time to time, and that these goods were deposited in that manner, and without notice to the agent of the railroad company. The opinion cites with approval Section 91 of Hutchinson on Common Carriers, stating the rule as to the liability of the carrier upon freight, under circumstances such as obtained in 38 Illinois, 20 Conn., and 33 Conn.

In Green vs. the Railroad, 38 Iowa, 100, the plaintiff sent her trunk properly labeled with her name and destination to the depot of the company during business hours in the evening, intending to take passage on its train the next morning, and the company's employees being at supper, the drayman put the trunk down in the waiting room without notice to any of them, as he had often done before, which was proven to have been the custom with passengers intending to leave by the morning trains. It was held that when the trunk was thus deposited it was at the risk of the company, and it

having been burned during the night, the company was held liable:

"That the delivery may be made at the proper time of receiving such baggage under the express assent or authority of the carrier, without notice to its employees, will not, we presume, be disputed," said the Court. "It is equally clear upon principle that this assent may be presumed from the course of business or the custom of the carrier. Upon evidence of this character contracts based upon business transactions are constantly established. * * * There was evidence tending to show a course of business on the part of the defendant, a custom to receive baggage left at the station house, as in this case, without notice to defendant's servants. Upon evidence of this character it was proper that the facts should have been left to the determination of the jury whether there had been a delivery of the property within the rules above announced; whether a course of business, a custom, had been established to the effect that a delivery of baggage at the station house, without notice, was regarded by defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom."

See, also Green vs. The Railroad, 41 Iowa, 410.

The rule as between the shipper and carrier is thus clearly stated by Hutchinson on Carriers, 2d Ed., Sec. 99:

"When the owner of the goods has done all in his power and all that he is required to do by his understanding with the carrier or the usage of the business to further shipment, and it becomes then the duty of the carrier to do whatever else is necessary to put them *in transitu*, the delivery and acceptance will be considered as complete from the time the carrier is informed that they are ready for him. As, where it was the course of business for a railroad company, when required to do so, to send its cars to a sidetrack at the place of shipment to receive cotton for transportation, and for the shipper there to load upon them the freight and make out a manifest and leave it with the agent of the company, who then had the bales counted, signed bills of lading and sent locomotives to

remove the cars thus loaded and place them in the train destined to the point to which the shipments were to be made, it was held that the delivery was complete as soon as the cotton was put upon the company's cars in this manner by the shipper and the company's agent informed of the fact."

Hutchinson on Carriers, Sec. 99, citing Ill. Cen. R. R. vs. Smyser, 38 Ill., 354.

This principle is quite well illustrated in the case of Coyle vs. Great Western Railroad Company, 47 Barb., 152. In this case the plaintiff, a brewing company, was in the habit of delivering goods to the defendant, the railroad company, at East Albany, and was in the habit of sending receipts with the last load of the particular shipment or shipments at all times prior to this occasion, and before the shipment in each case the goods were receipted for and entered in the books of the railroad company in accordance with the shipping order and receipt which would be sent with the last load. *On the occasion in question the goods were sent, but were not thus receipted for, and were not tallied by the receiving clerk of the railroad company, and it does not appear that the receiving clerk had knowledge of the presence of these goods at the station. The shipment was not entirely complete,* and in the night intervening before the completion of the shipment the goods were burned in the warehouse; notwithstanding the absence of the receipt and the incompleteness of the shipment, the defendant was held liable. MILLER, J., says:

"The delivery was complete, so far as the plaintiff was concerned, as he has nothing more to do. The taking of the receipts for the property was not essential to complete the delivery. It was for the plaintiff's benefit, and the defendant cannot complain because he thus failed to protect himself by a written acknowledgment of the delivery instead of relying upon ver-

bal proof of that fact should it be required, nor do I think that anything remained to be done by the consignee or his agent after the delivery of the property to the railroad company before they were ready to transport it. The counting, checking and entering the property upon the books of the company for shipment were matters connected with the course of business of the defendant which were for the benefit and protection of the railroad company, which could not in any way affect the delivery. Suppose these had all been entirely neglected and the goods had been shipped before they were sealed and had been lost or destroyed, would the defendant have been exonerated? Certainly not, for the very apparent reason that these were acts of the defendant and the plaintiff could not be made to suffer by their omission.

The same principle is applied in Insurance Co. vs. Railroad Co., 144 N. Y., 200, where it is held that the liability of the railroad company as a carrier began notwithstanding it was the duty of the shipper to load the freight into the cars when they were furnished by the carrier. The principle of the decision is that the liability of the common carrier begins when the goods are delivered to him at the place appointed, or provided for their reception in a fit and proper condition ready for immediate transportation. The goods in this case were hay, which was unloaded in bales at the defendant's freight house at Cape Vincent, but where the shipper was to load it into the defendant's cars. The cars had not yet been furnished, and the claim of the defendant was that its resonsibility as a common carrier had not attached to it at the time of the fire, and could not until the shipper had completed the work of loading. Upon this question EARL, J., says (205):

"There is no doubt that it is the duty, generally, of a railroad company to load the freight delivered to it

for transportation into its cars, and that it cannot generally devolve this duty by any regulation upon the shipper; and that it cannot legally, as a condition of transportation generally, exact from the shipper a contract to place the freight into its cars. But we know from our own observation that as to hay, lumber, sawlogs, and other bulky freight, the shipper usually loads the freight into the cars. We need not, however, now decide whether a railroad company can, as to such bulky freight, make a regulation that the shipper shall load it, because here the shippers acquiesced in the regulation and undertook the duty of loading. *But we do not think that the fact that the shipper undertakes to load the freight into the cars necessarily postpones the time when the railrord company takes on the character of a common carrier.* The rule as to the responsibility of the carrier is laid down in varying phraseology in a variety of cases, as follows: To render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him or to some person authorized to act in his behalf, must be established. His liability attaches only from the time he accepts the goods to be carried. To complete the delivery of goods to the carrier it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and consent. *The liability of a railroad company as a common carrier of goods delivered to it attaches only when the duty of immediate transportation arises. So long as the shipment is delayed for further orders as to destination of the goods, or for the convenience of the owners, the liability of the company is that of warehousemen. The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents, or servants, at the place appointed or provided for their reception when they are in a fit and proper condition and ready for immediate transportation.* If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods. But on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of

destination until something further is done or some further direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for his convenience and accommodation, and the receiver until some change takes place will be responsible only as a warehouseman."

The relation between connecting carriers is substantially the same as that between shipper and carrier (Railroad Co. vs. Railroad Co., 82 Kentucky, 541).

In the case of Conkey vs. Milwaukee & St. Paul Railway Co. (31 Wis., 619), a leading case in support of the continued liability of the first carrier, DIXON, C. J., giving the opinion of the Court, very clearly states (notwithstanding the initial carrier was held liable upon the facts of that case), that in a case presenting facts similar to the case at bar, he would have treated the goods as having been delivered by the first to the second or succeeding carrier. Thus he says referring to the decision in Wood vs. Railway Co., 27 Wisconsin, 541 (p. 630):

"That usage, now become universal, or very nearly so, is for the railway company receiving the goods destined for a place beyond the terminus of its route to transport them over its own road and then deliver them to the next company or carrier in the line of transit, collecting from the latter its own charges for freight and transportation, whereupon the latter becomes invested with a lien upon the goods for the charges so advanced in addition to his rates or charges for the transportation and delivery to the next succeeding carrier, who, in turn, advances the charges of the two that have preceded, and thus the process continues and is repeated until the goods have reached their place of destination and are in the hands of the last carrier, ready for delivery to the consignee or owner, subject to payment to such carrier of the accumulated charges of all the preceding carriers over whose routes they have been transported.

"Now, it was upon this well known custom and usage, amounting as it does to an implied contract or promise on the part of each succeeding carrier to pay back charges and receive and carry forward the goods brought to it by the preceding one, that I relied as constituting the true ground of action or liability against the succeeding carrier, in case he unreasonably failed to receive and carry forward the goods according to his implied contract or obligation, and as he had held himself out as ready and willing and promising to do. That contract or obligation, I then thought and still think, created a liability on his part co-extensive with and similar in nature to his liability as a common carrier, in case he neglected or refused, in proper time and according to the usual course of business, to receive the goods, and they were afterwards, and before coming to his possession, lost or destroyed. *I then looked upon his liability, and still do, as being in extent the same as if the loss or destruction had been of the goods in his custody and possession as a common carrier. It was to my mind like the case of goods delivered to a carrier for transportation and which were destroyed before the transit commenced. By the law of common carriers, their liability is fixed on receipt of the goods, and if they are lost in the warehouse of the carrier or elsewhere before the carriage commences, the carrier must respond, unless the loss was caused by a force superior to and beyond human agency and foresight, or by the public enemy, the onus of showing which is upon the carrier (Blossom vs. Griffin,* 13 N. Y., 569; *Ladue vs. Griffith,* 25 N. Y., 364*). I regarded the goods when separated and set apart in the accustomed place in the warehouse, and ready for delivery, by the preceding carrier, and after a reasonable time had elapsed for the succeeding one to receive them, and when, in the due course of business, he should have done so, as being pro hac vice, if need be, in the warehouse of the latter awaiting transportation by him, or, if necessary for the purpose of the remedy, constructively in his possession as a common carrier.*

"Such were the views which I then entertained, and I have as yet discovered no good reason for changing them. I then thought and still think, that the loss, if possible, should be made to fall on the carrier in fault, or him who appeared most so, and it was for this reason I assented to the rule that the last carrier should be held responsible as such, only until a rea-

sonable time had elapsed for the next carrier to receive the goods, and not after that time."

The Foregoing Principles Applied to this Case.

Applying the principles of these cases to the case at bar, it seems impossible to arrive at any other conclusion than that the cotton which, from October 17 to October 30, was deposited upon the wharf at Westwego, had completed its transportation from Roxton to New Orleans; the fact that the cotton was from the moment of deposit upon the wharf awaiting the pleasure of Elder, Dempster & Co. and the Harrison line to send their ships and take it away; the further fact that this dock was the agreed place for delivery of this kind of goods to Elder, Dempster & Co. and the Harrison Line; and that both Steamship Companies had notice of the presence of this cotton upon this dock, had received the transfers of the cotton, bring the case at bar, as we insist, within the precise principle of the case of Pratt vs. The Railway Company, cited *ante*.

The sole distinction which the trial Court sought to make beween the case at bar and Pratt vs. The Railway Company, namely, that the title to the dock was in the Texas and Pacific Railway Company, is held, in Insurance Company vs. Wheeler, to be wholly immaterial, as indeed it must be when carefully considered. It was, as DIXON, C. J., says, *pro hac vice*, the dock of Elder, Dempster & Co. and the Harrison Line for the purposes of receiving freight by them. By their agreement with the Texas and Pacific Railway Company, and the use which they had made of it prior thereto they

had made it their dock, for the purposes of delivering to them cotton shipped under such contracts, and as GROVER, J., says, in Insurance Co. vs. Wheeler, it was the use that was the determining factor, and not the title in the dock or the wharf; nor does the further fact that the dock was in the general control of the employees of the Texas and Pacific Railway Company, modify the rule in any way. In Insurance Co. vs. Wheeler, the warehouse at Ogdensburg was in the general control of the employees of the Transportation Company, who kept the same locked, and kept the keys in that company's office, and yet the defendant railway company was held liable for flour in the warehouse.

For the purposes of shipments by the steamship companies, it was in the control of their employees, for the testimony is that they could go there at their pleasure, and take possession of this cotton without any hindrance or action on the part of the Texas and Pacific Railway Company, and control the dock to the extent that was necessary to enable them to load the cotton on board their ship. That is to say, the agreement between the parties being that this was the point for reception of freight by Elder, Dempster & Company and the Harrison Line, common carriers, impliedly a part of that contract was the control of that dock by them, so far as the same was necessary for the reception of such freight, and its loading upon their vessels, and the course of business clearly demonstrates that it was so understood and acted upon by the parties.

The further fact that this cotton was counted, checked and a receipt given therefor at the time when the Steamship Companies came for it, under the principle as announced in 38 Illinois, Con-

verse vs. The Railroad Co., and Pratt vs. The Railway Co., should have no controlling force, and none is given in those cases to these mere incidental circumstances. In those cases, as strongly as in this, was it urged upon the Court that delivery was dependent upon such circumstances, but the Court say that delivery is not made dependent upon the transmission of a paper from one person to another, the counting of the goods and the tallying of them; but the fundamental fact that the carrier had designated a particular place where it would receive freight, and that the deposit of the freight at those places (without notice in most of the cases, but clearly when there was notice, brought the goods within the possession of the carrier, who had made the designation of the place of deposit, and that the giving of these papers, or the withholding of them, was a matter that concerned the convenience of the parties, their security as between themselves, and an orderly course of business, and nothing more.

The principle decided by the Court of Appeals of New York in Goold vs. Chapin, 20 N. Y., 259, was urged in the Clayton case as decisive against the railway company's position in this case. There is a clear distinction between the facts of that case and the case at bar. In that case the defendants were common carriers from New York to Albany, and carried the goods to Albany and there unloaded them from the vessel to a float belonging to them, which belonged solely to them, and was used solely by them to deliver to canal boats. While there they made one or more requests of the connecting carrier to stop and take the goods from the float, which was not done, and a fire occurred, and they were consumed. It was held that there was no deliv-

ery to the next carrier, and that the first carrier was still responsible.

The distinction between that case and the case at bar on the facts is this : the float on which the goods were at the time of the fire was the first carrier's, and was used only for its purposes. The calling for them by the second carrier and the taking off of the goods was merely an accommodation to the first carrier, in lieu of requiring it to take the goods to the second carrier's wharf or warehouse. The float was in no sense whatever the float of the second carrier, not even in the use made of it. The second carrier had never, in contract or otherwise, agreed to it as a place of delivery of goods to it as a carrier. In the case at bar the contract of Elder, Dempster & Co. and the Harrison Line was to make the Westwego wharf its place of delivery to it of the cotton, and this fact distinguishes widely the case at bar from the facts of the case of Goold vs. Chapin, and brings it exactly within the principle of the later case in the same Court, of Insurance Co. vs. Wheeler (cited *ante*), and also of Pratt vs. Railway Co. in this Court.

IV.

In the commercial sense, Westwego was a part of the port of New Orleans, and the railway company carried this cotton to the port of New Orleans.

The claim is made in this case that, inasmuch as Westwego was not, on the 12th day of November,

1894, within the limits of the port of New Orleans, as a port of entry, or collection district, as defined by Act of Congress, the carriage of this cotton to Westwego instead of to the city of New Orleans, was a deviation, and that by reason of it the railway company is not entitled to the benefit of any of the provisions of the bill of lading. We have discussed this question fully, and cited all the authorities in the case of Texas and Pacific Railway Company vs. Reiss and others, No. 307 in this Court. We do not deem it necessary here to repeat the arguments advanced in that case, but refer to our brief and argument therein for a full statement of the facts, and of the law bearing upon this question, confident that this Court will not sustain the claim of the plaintiff in error upon this branch of the case.

V.

The judgment and order of the lower courts should be reserved.

Respectfully,
RUSH TAGGART,
ARTHUR H. MASTEN,
Of Counsel for Defendant in Error.